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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHILIP FITZPATRICK,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

A. Was due process violated where a witness was called before a state grand jury under a statutory grant of immunity in order to match his recollection of non-material matters against that of a prior recorded conversation when the witness was never asked for information in the grand jury's purported area of interest?

B. Was the evidence in support of Fitzpatrick's state conviction insufficient?

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In the

Supreme Court of the United States

October Term, 1981

Philip Fitzpatrick,

Petitioner,

—against—

The State of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Philip Fitzpatrick respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 23, 1982.

Opinions Below

The opinion of the Court of Appeals is unreported and appears in Appendix A. The Court of Appeals affirmed the judgment of the United States District Court for the Southern District of New York, Pierce, J., denying Philip Fitzpatrick's petition for a writ of habeas corpus. Fitzpatrick sought reversal of his conviction under New York State law on four counts of perjury in the third degree. N.Y.P.L. §210.05.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §2254. This petition for writ of certiorari is filed within 60 days of the entry of the Court of Appeals judgment of affirmance.

Constitutional and Statutory Provisions Involved

U.S. Const., amend. 14, 28 U.S.C. §2254; New York Penal Law §210.05 (McKinney 1978). These provisions appear in Appendix B to this petition.

Statement of the Case

The United States Court of Appeals for the Second Circuit affirmed the judgment of the United States District Court for the Southern District of New York which denied Philip Fitzpatrick's petition for a writ of habeas corpus. Fitzpatrick sought reversal of his New York State conviction on four counts of perjury in the third degree. The judgment of conviction was entered after a jury trial in Supreme Court, New York County (Edwards, J.), on June 22, 1979. Fitzpatrick was sentenced to four concurrent terms of 90 days imprisonment followed by six months probation. On October 8, 1980, Fitzpatrick's sentence was reduced to three years probation, which commenced on that day.

In Fitzpatrick's motion to dismiss the indictment which was filed prior to trial, dismissal was sought on the grounds that it was a violation of due process to call this witness before the grand jury for the sole purpose of prosecuting him for perjury without any purpose of obtaining com-

petent evidence to indict another. (A. 16)* Only federal cases were cited by petitioner in the state court motion. That motion was denied and Fitzpatrick was ultimately convicted.

Thereafter on June 5, 1980, the Supreme Court Appellate Division, First Department, unanimously affirmed Fitzpatrick's conviction. At the Appellate Division petitioner again contended that his rights to due process had been violated by the questioning of petitioner before the grand jury and that the evidence was insufficient to establish his guilt beyond a reasonable doubt. The Appellate Division did not issue a written decision. Thereafter, on August 27, 1980, Judge Bernard S. Meyer of the New York State Court of Appeals denied Fitzpatrick's application for leave to appeal to the Court of Appeals.

Having exhausted his state remedies, petitioner filed an application for a writ of habeas corpus on October 9, 1980. The matter was assigned to Judge Lawrence W. Pierce, who adopted the Magistrate's recommendation and report, which found the state remedies had been exhausted on the issue of the perjury trap, as well as the insufficiency of the evidence and improper summation. However, the District Court denied the petition by judgment dated September 16, 1981. The Second Circuit Court of Appeals affirmed the denial by judgment dated April 23, 1982. The Court assumed, without deciding, that Fitzpatrick had exhausted his state remedies as to each issue raised. The Second Circuit wrote that if this had been a direct appeal from a federal district court trial, it would have been inclined to exercise its supervisory powers and vacate the conviction on the basis of the problematic conduct by

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* Page references in parentheses preceded by the letter "A" refer to pages in the Appendix submitted to the State appellate courts.

the prosecutor. The Circuit Court was troubled by the fact the state claimed to have been interested in Fitzpatrick's motive in misrepresenting his relationship with various parties while conversing informally with a New York District Attorney. However, the prosecutor failed to inform Fitzpatrick that his conversation had been taped and did not inquire of Fitzpatrick why he had made them the misrepresentations. The Second Circuit, however, did not find that Fitzpatrick's claim presented a federal constitutional issue entitling him to habeas corpus relief.

Statement of Facts

Petitioner Philip Fitzpatrick, a member of the Bar of the State of New York, was indicted for four counts of perjury in the third degree predicated upon testimony which he gave during the course of four separate appearances on July 19, 22, 29 and October 2, 1979. At each of the grand jury appearances, Fitzpatrick was sworn, testified and received statutory transactional immunity. The grand jury had been impaneled for the purpose of investigating whether, during the autumn of 1976, anyone conspired to unlawfully influence the outcome of a pending criminal case, *People* v. *Carl Gallo and Ronald Sofia*. The defendants were then under indictment in Special New York City Narcotics Parts for the sale of controlled substances.*

The focus of Fitzpatrick's grand jury testimony initially was upon a conversation which he concededly had on October 14, 1976, with Assistant District Attorney Charles Heffernan, who was the prosecutor assigned to the *Gallo-Sofia* case. The conversation was conducted in the Staten

* They ultimately pleaded guilty and were sentenced to indeterminate eight years to life sentences.

Island residence of the prosecutor. Unknown to Fitzpatrick, his conversation with the prosecutor was being surreptitiously recorded. Therefore, at the time Fitzpatrick appeared before the grand jury and was questioned concerning what he had said to the prosecutor nine months earlier, he was unaware that his recollection of the brief conversation was being tested against the tape of the nine-month old conversation. At no point did the prosecutor play the tape for Fitzpatrick, nor did he afford him an opportunity to refresh his recollection by showing him a transcript of the tape recording.

Another focus of the grand jury questioning, as reflected in the indictment, was a meeting which took place at the Manhattan law office of Paul Curran, Esq., involving Mr. Curran, Fitzpatrick and a Jesuit priest, Father Wood. More particularly, the grand jury questioning dealt with the point in time Fitzpatrick left Mr. Curran's office prior to the completion of the meeting.

As a result of Fitzpatrick's testimony before the grand jury, he was indicted for four counts of misdemeanor false testimony. Misdemeanor perjury was charged because of the non-materiality of the information sought. None of the counts dealt with the substance of either of the two meetings, but rather were based on discrepancies and variations between Fitzpatrick and the tape recorded conversation (counts 1, 2 and 3) and between Fitzpatrick and Father Wood. Although the State's claimed interest in Fitzpatrick's testimony was to learn what his motive was in misrepresenting the relationship of the parties in his conversation with Heffernan and Curran, the State never confronted him with the tape, nor did it ask him about the contradictions.

Count 1 charged that Fitzpatrick lied when, on July 29 and October 7, 1977, he denied telling the prosecutor

Charles Heffernan on October 14, 1976, that he had a "long-standing relationship with a priest" by the name of Father Wood.

Count 2 charged that Fitzpatrick lied when, on July 29, and October 7, 1977, he told the grand jury that at the same October 14, 1976, meeting, he told Heffernan that the priest, Father Wood, was a friend of a friend of Fitzpatrick.

Count 3 charged that perjury had been committed on July 29, 1977, when Fitzpatrick testified that on October 14, 1976, he told the prosecutor that the priest and another had "dealt with each other in the past."

Count 4 charged that Fitzpatrick committed perjury on July 19 and 22, 1977, when he was questioned about the October 19, 1976, meeting with Mr. Curran and Father Wood. The perjurious statement was that Fitzpatrick stated after 'introductory remarks," he stepped out of Curran's office until the meeting concluded.

Portions of Fitzpatrick's testimony, as given before the New York County Grand Jury on July 19, July 22, July 29 and October 7, 1977, (People's Exhibits 9-9D, 10-10K, 11-11C and 12-12E, respectively) formed the bulk of the State's case. Tr. 720-737. Filtzpatrick testified about the two meetings which had taken place a full nine months earlier. It was clear from these minutes that he did not have a precise recollection of the peripheral details of the conversations, although he testified fully and truthfully concerning the substance of the discussions. Thus, when Fitzpatrick was asked on July 19, 1977, about what transpired at the meeting with Paul Curran and Father Wood on October 19, 1976, he testified:

> A. Eventually, an appointment was made with Paul Curran which I went with Father Wood, introduced them to each other and it turned out that at that point

they knew each other. I left them in the room. I told Paul Curran that Father Wood was there to speak on behalf of the boy. He was friendly with the family. I in no way indicated I was speaking or saying anything on behalf of the boy. I left the two of them in the room. They had a conversation. The part of the conversation was the part where they indicated they knew each other, and each were friends. I waited outside. Father Wood finished his conversation.

Q. Excuse me?

A. I waited outside. They had a conversation. When they finished the conversation, we left the building.

Q. Did you have a conversation yourself with Mr. Curran?

A. Merely an introductory basis, wherein I said, this is Father Wood. He had an interest in the boy, that is in trouble. He was a friend of the family. He would like to speak to you. I didn't know the nature that Father Wood had to say. My understanding, this whole conversation, his interest was in the humanitarian moralistic sense. This was a boy worth saving. I didn't speak on behalf of the boy at any time.

Q. Is that the extent of your involvement in that conversation with Mr. Curran?

A. To the best of my recollection.

Q. How many occasions did you meet with Mr. Curran?

A. One.

Q. Were you present when Father Wood and Mr. Curran were discussing the matter?

A. Only to give a point that I indicated to you with Father Wood indicated to Mr. Curran that he was a friend of the boy's family. He thought the boy was worth saving and that was the purpose of his being

there to see Mr. Curran. Whether he was there to see Mr. Curran on the basis of Mr. Curran or to seek Mr. Curran's professional guidance or experience, I don't know.

Q. At this meeting with Mr. Curran, what was said in your presence by Father Wood and by Mr. Curran?

A. To the best of my recollection, what I already told you twice. What was said, they were introduced to each other, they exchanged greetings. They knew each other from a prior—I don't know, maybe Mr. Currant went to that school. Father Wood said he had a boy he wanted to intercede in behalf of the family. Close to the family. There was additional conversation while I was not in the room.

Q. Where did this meeting take place?

A. In Mr. Curran's law office.

Q. And you stepped outside of Mr. Curran's office?

A. I left his office, went out to the waiting area, while they had additional conversation.

Q. Approximately how long were they in conversation?

A. Fifteen minutes.

Q. And what happened at the conclusion of those fifteen minutes?

A. Father Wood left, came out with Mr. Curran. We all shook hands. I went down the elevator, I went back to Staten Island.

Tr. 721-25

Thereafter, when Fitzpatrick was questioned on July 22nd about the same meeting, he repeated his testimony:

A. We all went into Curran's office.

Q. Sit down?

A. Sat down.

Q. Remember where you were seated?

A. No.

Q. Remember whether there was a couch in the office?

A. I would say, no.

Q. Curran sit behind a desk?

A. Yes.

Q. What happened at that point?

A. I proceeded and I cannot give it to you verbatim, I proceeded to introduce Father Wood as a priest interested in the boy, a matter pending in a narcotics case, a court downtown. Father Wood then exchanged some greetings with Paul Curran. It developed they knew each other.

Q. You say it developed?

A. Through their conversation.

Q. It was not immediately evident.

A. I would say, no.

Q. Did they talk about their past lives or some way realize after some period of time they knew each other?

A. There was a converastion as to mutual acquaintance.

Q. There came a point they discovered they knew each other?

A. Yes.

Q. They had not known at the beginning?

A. That was my very clear impression.

Q. What led you to leave that meeting while the two of them were talking?

A. When Father Wood got to the point after the introductions were made and the priest wanted to talk to him, I said I will wait outside, and I went outside and waited.

Q. For approximately what period of time were the two of them alone?

A. Fifteen minutes.

* * *

Q. And you had been with the two of them making the introductions?

A. Five minutes.

Q. You state that you were in with Mr. Curran for approximately fifteen minutes and Father Wood was with Mr. Curran for approximately fifteen additional minutes?

A. I am estimating?

Q. What happened at the conclusion of the meeting between Father Wood and Mr. Curran?

A. You want me to say it again?

Q. Yes.

A. The two of them came out of the area I was at at that time. Said good-bye, exchanged greetings. I went down in the elevator with Father Wood. He went his way and I went mine and never saw or spoke to him again.

Tr. 726-30.

Count 4 of the indictment was based upon this evidence.

When the subject of the interrogation shifted to the conversation with Heffernan, Fitzpatrick, testifying from unrefreshed memory, could not recall all of the details of the discussion.

Q. At your meeting with Mr. Heffernan, did you tell Mr. Heffernan you had known Father Wood for many years?

A. I don't recall saying that.

Q. If you said that, could you recall it?

A. I don't think I would say it because I hadn't known Father Wood for many years.

Tr. 730.

Later, Fitzpatrick was asked whether he had dealt with Father Wood in the past. He replied:

> "No, I told him, Mr. Heffernan, Father Wood and Sidney Bergman had dealt with each other in the past. . . ."

Tr. 732.

Again on October 7, 1977, when Fitzpatrick was asked about his relationship with Father Wood, he explained the situation as follows:

> Q. Did you tell Mr. Heffernan that you and Father Wood had a longstanding relationship with one another?
>
> A. I don't remember ever saying that. I think I told Mr. Heffernan that Father Wood was an old friend or a dear friend of a friend of mine, meaning Sidney Bergman.
>
> Q. Did you represent to Mr. Heffernan that Father Wood was, in substance, a close friend of yours?
>
> A. I don't believe I did.
>
> Q. Was it in substance that you and Father Wood had a longstanding relationship?
>
> A. No. I think I said Father Wood had a longstanding relationship with a friend of mine, Sidney Bergman.

Tr. 732-33.

Despite this context, the first perjury count was predicated upon that question and answer, which was read to the jury at the trial as follows:

> Q. Did you tell Mr. Heffernan you had a longstanding relationship with Father Wood?
>
> A. No.

Tr. 731.

The evidence offered by the People to establish Count 2 was based on Fitzpatrick's memory before the Grand Jury

as to whether he told Heffernan the priest was a friend of a friend. Fitzpatrick thought he had mentioned that fact to Heffernan and, although the priest was a friend of Fitzpatrick's friend, Sidney Bergman, Fitzpatrick's faulty memory as to whether he had said that nine months earlier formed the basis for the charge against him. In that regard, Fitzpatrick described his relationship with Father Wood:

> Q. Did you tell Mr. Heffernan that you had done favors for Father Wood in the past and he had done favors for you?
>
> A. No.
>
> Q. Did not?
>
> A. Not to the best of my recollection. This is not the case. I don't think I said that. I did say that Father Wood was a good friend of a good friend of mine and I understood Father Wood had done favors for Sid and Father Wood had a lasting or enduring friendship.

Tr. 730-31.

At his October 7th appearance before the Grand Jury, Fitzpatrick reiterated that he did not have a longstanding relationship with Father Wood, but that the priest had known Fitzpatrick's friend, Sid Bergman.

Count 3 of the indictment was also based on Fitzpatrick's representations to Heffernan rather than the truth of Fitzpatrick's Grand Jury testimony. Thus, in explaining the relationship between the parties to the Grand Jury, Fitzpatrick testified:

> Q. Did you tell Mr. Heffernan you and Father Wood had gone back a long ways?
>
> A. I know that Sid and Father Wood went back a long way.

Q. Did you tell Mr. Heffernan that Father Wood had done you favors in the past.

A. I've already answered that.

Q. And your answer was not; is that correct?

A. Yes, that's correct.

Q. How many meetings have you had with Mr. Heffernan?

A. One.

Q. Did you ever tell Mr. Heffernan that you had dealt with Father Wood in the past?

A. No, I told him, Mr. Heffernan, Father Wood and Sidney Bergman had dealt with each other in the past and Father Wood was a dear friend of a friend of mine.

731-32.

Fitzpatrick repeated his answer when the question was once again rephrased:

Q. Yet you say it's possible that you might have told Mr. Heffernan that you and Father Wood had done each other favors in the past?

A. I don't recall. I don't think I related that. I think the conversation that I had with Mr. Heffernan was that Father Wood, as I explained to you, was a friend of this family and that he was a friend, and a very close friend of a friend of mine who was Sid Bergman. I indicated that my interest was to do a favor or to facilitate Mr. Bergman and those two were friends and had a longstanding relationship. That's the best I can recall about the conversations about longstanding relationships, that friendships and relationships longstanding existed between Sid Bergman and Father Wood.

Tr. 733-34.

He continued:

Q. Do you recall telling Mr. Heffernan any inaccuracy on October 14th, 1976?

A. No, I don't. I told you three time to the best of my recollection I related to Mr. Heffernan that Sidney Bergman and Father Wood were friends, old friends of longstanding and maybe they did each other favors and that I was friendly with Mr. Bergman and my purpose was to facilitate Mr. Bergman and Father Wood who were the old friends and had the longstanding relationship.

Tr. 734-35.

* * *

Q. I am interested at this point, Mr. Fitzpatrick, if you will, developing your representations to Mr.Heffernan on October 14th meeting. The Grand Jury is interested in knowing whether or not you made certain representations to Mr. Heffernan, one of those being did you tell Mr. Heffernan that you and Father Wood had, in fact, dealt with each other in the past?

A. No, I think if he understood something to that effect, it must have been related to an indication that I said Father Wood had a long relationship with Sid or Sid had a long relationship with Father Wood and/or with other people.

Q. In that same regard, did you represent to Mr. Heffernan that you and Father Wood had a longstanding relationship?

A. No, that Father Wood had a longstanding relationship with other people that I knew of.

Tr. 736-37.

Reasons for Allowance of the Writ

ARGUMENT

A. *The Improper Use of the Grand Jury as a Perjury Trap Denied Fitzpatrick Due Process of Law.*

Fitzpatrick stands convicted of four misdemeanor "false swearing" counts which, even when the questions asked and the answers given are viewed in the light most favorable to the State, were non-material to the investigation of the Grand Jury. Put another way, the case was prosecuted in the legal posture that Fitzpatrick's responses, whether true or false, accurate or inaccurate, had no tendency to influence or affect the investigation, nor did they attempt to influence the "Gallo-Sofia" case.

Notwithstanding the prosecution's avowed need to determine why Fitzpatrick was misrepresenting his relationship with the parties, at no time did the prosecutor in the Grand Jury afford Fitzpatrick the opportunity to refresh his recollection by listening to all or part of the tape recording or reading a transcript of the surreptitiously recorded "Fitzpatrick-Heffernan" meeting at Heffernan's Richmond County residence on the evening of October 14, 1976. The prosecutor thus failed to inform Fitzpatrick that he knew of his misrepresentations and, therefore, failed to inquire why he had misrepresented.

It is a denial of due process when a witness is asked concededly non-material questions concerning a conversation, a verbatim recording of which is in the possession of the interrogating prosecutor but which is not played for the witness, and, when the witness' recollection varies from the tape, that he can be indicted and later convicted for a crime and sentenced to a period of incarceration in a penitentiary.

If the Grand Jury was searching for the truth, the prosecutors, as with any other witness whom he believes possesses vital information, would have afforded the witness an opportunity to refresh his recollection either by hearing the tape, viewing the transcript, or both. In addition, if the investigation was truly *bona fide* and the subpoena served upon Fitzpatrick truly issued in good faith, surely the prosecutor should not have stood idly by and allowed the witness to persist in his inaccurate responses when the prosecutor had the tools to afford the witness the opportunity to correct his testimony and the details of the testimonial inaccuracies were collateral in nature.

The reason this was not done for Fitzpatrick was that the Grand Jury was going no place, and the prosecutor felt compelled to justify the effort expended by securing a conviction for something. There was no evidence of any substantive violation of law and, indeed, no other indictments were returned in connection with this investigation. What did occur was the construction of a perjury trap which tested Fitzpatrick's fading memory against a non-fallible tape recording and led to his indictment when his responses deviated from the tape made some nine months earlier.

The law recognizes that, where the sole purpose of a grand jury subpoena *ad testificandum* is to extract a witness' testimony with a view toward prosecuting him for perjury without any real purpose of obtaining competent evidence to prosecute another, the grand jury and the legal process issued under its name is being improperly utilized and any indictment or conviction which issues thereafter is expressly voidable by the judiciary. *See Brown* v. *United States*, 245 F.2d 549, 555 (8th Cir. 1957); *United States* v. *Mandujano*, 425 U.S. 564, 96 S.Ct. 1768, 1779 (n.8 (1979)); *United States* v. *Doss*, 545 F.2d 548, 550 (6th Cir. 1976); *United States* v. *Cross*, 170 F.Supp. 303 (D.C. Cir. 1959); *United States* v. *Icardi*, 140 F.Supp. 383 (D.C. Cir. 1956).

Had the prosecutor truly been interested in utilizing Fitzpatrick as an informational source, he had only to refresh Fitzpatrick's recollection by playing the tape or showing him a transcript. Had Fitzpatrick then testified falsely or perhaps contemptuously, the seeking of an indictment for intentional false statements would certainly have been proper.

To subpoena a cooperating, immunized witness to the Grand Jury and then pit his memory against an infallible tape and a sophisticated prosecutor-witness was manifestly unfair, particularly in light of the passage of time between the incidents involved and the interrogation in the Grand Jury.

Indeed, at no point in these proceedings has it been suggested, much less set forth, what legal effect Fitzpatrick's testimony would have had upon the Grand Jury if there had been no deviation from the tape or if Fitzpatrick had testified he had remained in Paul Curran's office throughout the discussions. Armed with the testimony of former United States Attorney Curran and a priest, Fitzpatrick could not have added to the Grand Jury's knowledge of what had transpired.

A full and fair reading of the trial transcript and Fitzpatrick's grand jury testimony amply establish the unfairness of the interrogation of him—an unfairness rising to a deprivation of due process. It is by reason of this unfair questioning that the writ should issue and the State court judgment vacated.

B. *The Evidence in Support of Fitzpatrick's State Conviction Cannot Be Fairly Characterized as Sufficient to Have Led a Rational Trier of Fact to Find Guilt Beyond a Reasonable Doubt.*

As matter of federal constitutional law, it is an essential constitutent of the due process guaranteed by the four-

teenth amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof. The sufficiency of that proof is defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *In re Winship*, 397 U.S. 358 (1970).

Under 28 U.S.C. §2254, a federal court must entertain a claim by a state prisoner that he is being held in custody in violation of the constitution of the United States. Under *Winship, supra*, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim. *Jackson* v. *Virginia*, 443 U.S. 307, 320-321 (1979).

Under this standard Fitzpatrick's conviction of four counts of misdemeanor perjury cannot stand. A review of the record in the light most favorable to the prosecution establishes that a rational trier of the fact could not have found Fitzpatrick guilty beyond a reasonable doubt of four counts of perjury in the third degree under New York Law.

As applied to a trial for the giving of false testimony, the prosecution was required to competently establish, *inter alia*, beyond a reasonable doubt, that Fitzpatrick intentionally lied when he testified before the Grand Jury and that his testimony was not predicated upon human fallibility of memory. Put another way a verdict of guilty cannot be permitted to stand, as a matter of due process, where the underlying evidence is as consonant with fallibility of memory as with willful falsification. *People* v. *Samuels*, 284 N.Y. 410 (1910); *People* v. *Lombardozzi*, 35 A.D.2d 508 (2d Dep't 1970), *aff'd.*, 30 N.Y.2d 677 (1972); *People* v. *Blumenthal*, 55 A.D.2d 13 (1st Dep't 1976).

Where the evidence is as consonant with fallibility of memory as with willful falsification, it cannot be said the evidence of "intent to lie" is present beyond a reasonable doubt. In the instant case, the prosecutor's contention was that Fitzpatrick intentionally lied when he testified before the Grand Jury that on October 14, 1976, he did or did not make certain statements to Mr. Heffernan.

To establish Count 1, the People were required to prove beyond a reasonable doubt that (1) Fitzpatrick remembered all of the details of the meeting with Heffernan, (2) Fitzpatrick told Heffernan he had a longstanding relationship with the priest, and (3) Fitzpatrick actually remembered telling Heffernan on October 14, 1976, of the longstanding relationship, but intentionally denied having said this to Heffernan when questioned before the Grand Jury about this on July 29, 1977 and October 7, 1977.

Turning to the actual Grand Jury testimony of July 29th which relates to this area, the following questions and answers were given.

> Q. At your meeting with Mr. Heffernan, did you tell Mr. Heffernan you had known Father Wood for many years?
>
> A. I don't recall saying that.
>
> Q. If you said that, could you recall it?
>
> A. I don't think I would say it because I hadn't known Father Wood for many years.

Later, Fitzpatrick was asked whether he had dealt with Father Wood in the past. He replied:

> "No, I told him, Mr. Heffernan, Father Wood and Sidney Bergman had dealt with each other in the past. . . ."

Mindful of this position, the claim of perjury is predicated upon this question and answer which appears in the trial transcript as:

Q. Did you tell Mr. Heffernan you had a long standing relationship with Father Wood?

A. No.

Having just told the Grand Jury he did not recall telling Heffernan he knew Father Wood for many years, it is clear the prosecutor's rephrasing of the questions, following concededly truthful testimony concerning the nature and duration of the relationship, belies any intent to lie. Mindful that no tape was played or transcript displayed to correct this statement, it is clear the mere fact Fitzpatrick may have alluded to such a relationship at the October 14, 1976 meeting does not establish, much less suggest, perjury on July 29, 1977.

Similarly, a full and fair reading of Fitzpatrick's October 7th Grand Jury testimony, which was presented as evidence at trial, factually undermines any claim of intentional lying.

Fitzpatrick was asked:

Q. Did you tell Mr. Heffernan that you and Father Wood had a longstanding relationship with one another?

A. I don't remember ever saying that. I think I told Mr. Heffernan that Father Wood was an old friend or a dear friend of a friend of mine, meaning Sidney Bergman.

Tr. 732.

Fitzpatrick once again explained the nature of the relationship amongst the parties. Nonetheless, the following questions were given:

Q. I am interested at this point, Mr. Fitzpatrick, if you will, developing your representations to Mr.

Heffernan on October 14th meeting. The Grand Jury is interested in knowing whether or not you made certain representations to Mr. Heffernan, one of those being did you tell Mr. Heffernan that you and Father Wood had, in fact, dealt with each other in the past?

A. No, I think if he understood something to that effect, it must have been related to an indication that I said Father Wood had a long relationship with Sid or Sid had a long relationship with Father Wood and/or with other people.

Q. In that same regard, did you represent to Mr. Heffernan that you and Father Wood had a longstanding relationship?

A. No, that Father Wood had a longstanding relationship with other people that I knew of.

Tr. 736-37.

If the Grand Jury wished to know of the relationships between the various individuals, then Fitzpatrick's answers were full, truthful and complete. If the claim is that the Grand Jury was interested in what Fitzpatrick told Heffernan, then the verbatim tape of the conversation certainly supplied that.

The prosecutor's failure to play the tape and the multiple occasions upon which iFtzpatrick was compelled to candidly set forth the duration and manner of his relationship with Father Wood and the others undermines not only any claim that the Grand Jury inquiry was conducted in good faith and not as a perjury trap, but also any contention that Fitzpatrick lied when questioned about his representations to Heffernan some eight months earlier. In light of Fitzpatrick's candid testimony in all other respects, the passage of time and occurrence of events, and the fact that his recollection was not refreshed by the tape,

the prosecution failed to establish beyond a reasonable doubt that Fitzpatrick gave knowingly false testimony.

To establish Count 2, the People had the burden of showing Fitzpatrick intentionally gave false testimony when, on July 29th and October 7, 1977, he testified that on October 14, 1976, he told Heffernan that Father Wood was a friend of a friend. The People proved that he did not tell Heffernan this when they met on October 14, 1976, by playing the tape of the surreptitiously recorded conversation. However, they failed totally to establish that this was an intentional misstatement.

As early as the first Grand Jury appearance on July 19, 1977, Fitzpatrick told of the relationship between Wood and Bergman. All of this was truthful testimony. Indeed, the only references to Father Wood's relationship with Sid Bergman were as follows:

> Q. Did you tell Mr. Heffernan that you had done favors for Father Wood in the past and he had done favors for you?
>
> A. No.
>
> Q. Did not?
>
> A. Not to the best of my recollection. This is not the case. I don't think I said that. I did say that Father Wood was a good friend of a good friend of mine and I understand Father Wood had done favors for Sid and Father Wood had a lasting or enduring friendship.
>
> • • •
>
> Q. Did you ever tell Mr. Heffernan that you had dealt with Father Wood in the past?
>
> A. No, I told him, Mr. Heffernan, Father Wood and Sidney Bergman had dealt wtih each other in the past

and Father Wood was a dear friend of a friend of mine.

Tr. 731-32.

At no point did the Special Prosecutor play the tape of the October 14th conversation so Fitzpatrick could correct his testimony to reflect that while the underlying fact Father Wood was a longstanding friend of Sid Bergman was true, Fitzpatrick was mistaken in his belief he had told Heffernan of this on October 14, 1976.

When questioned in this connection on October 7th, Fitzpatrick was asked;

> Q. Your previous testimony for the grand jury I believe you testified that you told Mr. Heffernan that Father Wood was a friend of a friend's. Do you recall testifying to that?
>
> A. No. I don't. Well then he was a friend of Sid Bergman's, and that was what my understanding was.
>
> Q. Did you tell Mr. Heffernan that you and Father Wood had a longstanding relationship with one another?
>
> A. I don't remember ever saying that. I think I told Mr. Heffernan that Father Wood was an old friend or dear friend of a friend of mine, meaning Sid Bergman.

Tr. 732-33.

Fitzpatrick reiterated that he personally did not have a longstanding relationship with Father Wood. Thus the relationship between the parties was clear.

To claim, as the Special Prosecutor did, that Fitzpatrick lied because, while Father Wood was a friend of Sid Bergman's, Fitzpatrick never told Heffernan of that fact a year earlier, does not prove, much less suggest, Fitzpatrick intentionally lied to the Grand Jury. The mere fact Fitzpat-

rick did not tell Heffernan this does not establish Fitzpatrick perjured himself when he testified before the Grand Jury that he thought he had, unless and until the Special Prosecutor can establish Fitzpatrick gave his Grand Jury responses in this connection with the intent to lie and deceive. The mere fact Fitzpatrick's testimony is inconsistent when contrasted with the October 14th tape is not sufficient to establish an intent to lie.

Count 3 related not to the underlying truth or falsity of Fitzpatrick's Grand Jury testimony, but rather to Fitzpatrick's representations to Heffernan back on October 14, 1976. The People again attempted to prove that perjury was committed because Fitzpatrick told the Grand Jury he had told Heffernan that Father Wood and a person known to the Grand Jury had dealt with each other in the past when he never told Heffernan that on October 14, 1976.

Fitzpatrick's testimony was replete with constant references and explanations of the relationship between Fitzpatrick and Father Wood and between Father Wood and Fitzpatrick's friend, Sid Bergman. In such a posture, and mindful that no attempt was made by the Grand Jury prosecutor to remind Fitzpatrick or refresh Fitzpatrick's time-dimmed recollection of what was said back on October 14, 1976 to Heffernan, it does not follow that, merely because Fitzpatrick believed he told Heffernan Father Wood had dealt with the "person known to the grand jury," while the tape of the October 14th conversation reveals Fitzpatrick did not, the inconsistency rises to the level of perjury.

The fourth count of the indictment charged that Fitzpatrick intentionally lied concerning the duration of his stay inside Paul Curran's office. Fitzpatrick knew Curran for well over a decade. Fitzpatrick testified he made an

appointment by telephone to see Curran subsequent to his conversation with Father Wood. Father Wood and Curran knew each other from well before the October 14th meeting. As to what transpired at the meeting, Fitzpatrick testified:

A. Eventually, an appointment was made with Paul Curran which I went with Father Wood, introduced them to each other and it turned out that at that point they knew each other. I left them in the room. I told Paul Curran that Father Wood was there to speak on behalf of the boy. He was friendly with the family. I in no way indicated I was speaking or saying anything on behalf of the boy. I left the two of them in the room. They had a conversation. The part of the conversation was the part where they indicated they knew each other, and each were friends. I waited outside. Father Wood finished his conversation.

Q. Excuse me?

A. I waited outside. They had a conversation. When they finished the conversation, we left the building.

Q. Did you have a conversation yourself with Mr. Curran?

A. Merely an introductory basis, wherein I said, this is Father Wood. He had an interest in the boy, that is in trouble. He was a friend of the family. He would like to speak to you. I didn't know the nature that Father Wood had to say. My understanding, this whole conversation, his interest was in the humanitarian moralistic sense. This was a boy worth saving. I didn't speak on behalf of the boy at any time.

Q. Is that the extent of your involvement in that conversation with Mr. Curran?

A. To the best of my recollection.

Q. How many occasions did you meet with Mr. Curran?

A. One.

Q. Were you present when Father Wood and Mr. Curran were discussing the matter?

A. Only to give a point that I indicated to you with Father Wood indicated to Mr. Curran that he was a friend of the boy's family. He thought the boy was worth saving and that was the purpose of his being there to see Mr. Curran. Whether he was there to see Mr. Curran on the basis of Mr. Curran or to seek Mr. Curran's professional guidance or experience, I don't know.

Tr. 721-25.

Following this activity and conversation between Father Wood, Curran and Fitzpatrick, the latter left Curran's private office and walked to the waiting area. The entire conversation lasted, at best, some 15 minutes. Father Wood and Mr. Curran then came out and they left.

In light of this testimony, perjury could not be established for Fitzpatrick's testimony on July 19th. The meeting in question occurred some nine months earlier and was relatively brief. Clearly beyond the fact the meeting was held, who attended it and the broad general purpose of the meeting, it was unreasonable to expect a witness to remember the particular point in time when he left the meeting.

In essence, Count 4 charged Fitzpatrick left Father Wood and Mr. Curran alone after "introductory remarks" —a claim which ignores the Grand Jury testimony wherein what transpired prior to Fitzpatrick's leaving is clearly and fully set forth. A proper perjury charge cannot be founded upon a legal disagreement over the operations of Fitzpatrick's mind which allowed him to conclude that his leaving followed "introductory remarks" and not somewhat after, or even midway through the discussion. A disagree-

ment over one's state of mind or the manner in which one chooses to characterize something may not form the basis of a perjury charge. *See, e.g., People* v. *Rinaldi*, 35 N.Y.2d 843 (1974); *People* v. *Blumenthal*, 52 A.D.2d 13 (1st Dep't 1976).

The testimony of July 29, 1977, failed to establish a violation of the misdemeanor perjury statute. Indeed, during the Grand Jury questioning on July 22, 1977, after being questioned about the meeting in Curran's office, Fitzpatrick was asked:

> Q. Is it your testimony before this jury that the meeting with Curran, beyond the introduction, you yourself took no . . .
>
> A. That was the best of my recollection. It might have been more conversation. I don't recall.

Thus having qualified his testimony and indicated the tentative nature of his recollection of when he departed the Curran meeting, it cannot be said he intentionally gave prosecutably false testimony concerning the timing of his departure. In view of the fact the Grand Jury already had available to it the testimony of the two principals, Curran and Wood, the mere fact Fitzpatrick's recollection of the timing of his departure may have differed from the recollection of Curran or Wood does not *ipso facto* establish Fitzpatrick intentionally gave knowingly false testimony.

In sum, a reading of the transcript, a listening to the tape of the October 14, 1976 Fitzpatrick-Heffernan conversation and the testimony of Fitzpatrick's four Grand Jury appearances held almost a year after the underlying events reveal that the facts of Fitzpatrick's intercession were truthfully laid bare.

Clothed with transactional immunity, Fitzpatrick lacked any motive to either deny telling Heffernan anything or un-

truthfully limiting the period of time he was in Curran's office with Father Wood. The mere showing that Fitzpatrick's testimony differed from the Heffernan tape or possibly differed from Father Wood's or Mr. Curran's recollection of when Fitzpatrick left the room does not establish Fitzpatrick intentionally gave false testimony.

The same logic applies to a review of the evidence of the Curran-Wood meeting. Thus that Fitzpatrick believed he left the room after "introductory remarks" does not *ipso facto* establish a concededly non-material perjury count merely because reasonable men could differ over precisely when and under what circumstances Fitzpatrick departed. Moreover, Fitzpatrick's Grand Jury testimony, particularly on July 19, 1977, indicates what was said in Fitzpatrick's presence. That Fitzpatrick may have dallied slightly beyond "introductory remarks," whatever that may mean to different people, does not establish that Fitzpatrick's responses in this connection were intentionally false. *Bronston* v. *United States*, 409 U.S. 352 (1973).

Clearly perjury means something more than being wrong or testifying mistakenly. Absent motive and intent, the testimony stands for what it is—an unintentional misstatement of non-material fact. The Grand Jury minutes are insufficient to establish intentional lying, and the People's proof failed to rule out fading memory and Fitzpatrick's mistaken belief that his recollection was accurate.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 82-2015

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of April, one thousand nine hundred and eighty-two.

Present:

HONORABLE J. EDWARD LUMBARD,
HONORABLE LEONARD P. MOORE,
HONORABLE THOMAS J. MESKILL,

Circuit Judges.

PHILIP FITZPATRICK,

Petitioner-Appellant,

v.

THE STATE OF NEW YORK,

Respondent-Appellee.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

This is an appeal from a judgment of the United States District Court for the Southern District of New York,

Pierce, *J.*, denying Philip Fitzpatrick's petition for a writ of habeas corpus. Fitzpatrick seeks to upset his New York State conviction on four counts of Perjury in the Third Degree, N.Y. Penal Law § 210.05.

This cause came to be heard on the transcript of record from the district court and was argued by counsel.

Fitzpatrick asserts three claims in support of his petition for habeas corpus. He contends that the evidence adduced at his trial was insufficient to support his conviction, that the prosecutor's summation was improper and that the prosecutor improperly used the grand jury as a "perjury trap."

A threshold issue on this appeal is whether Fitzpatrick has exhausted his state remedies on all three of his claims so as to permit federal court review of his petition. *Rose* v. *Lundy*, 50 U.S.L.W. 4272 (U.S. Mar. 3, 1982). There is no disagreement that Fitzpatrick raised each of his claim in his direct appeal to the New York State Supreme Court, Appellate Division. The only question is whether Fitzpatrick's briefs were sufficient to alert the court that he was relying on the United States Constitution as a basis for his requests for relief. *See, e.g., Johnson* v. *Metz*, 609 F.2d 1052 (2d Cir. 1979). We have carefully reviewed the papers filed in the state courts in this matter. Assuming without deciding that Fitzpatrick has exhausted his state remedies, we find no merit in his petition.

The evidence adduced at Fitzpatrick's trial was sufficient to support his conviction. It can fairly be inferred from the trial record that Fitzpatrick intentionally falsified his testimony before the grand jury. Therefore, it cannot be said that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979). In addition, we do not believe

that the prosecutor's summation to the jury was so improper and prejudicial as to deny Fitzpatrick a fair trial. *See generally Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647-48 (1974).

Fitzpatrick's "perjury trap" claim is somewhat more troublesome. We cannot understand how the truth-seeking function of the grand jury was advanced by the questioning of Fitzpatrick in this case. On appeal, the state claims to have been interested in Fitzpatrick's motive in misrepresenting his relationship with various parties while conversing informally with a New York district attorney. Despite this claimed interest, the prosecutor failed to inform Fitzpatrick that the state had taped the informal conversation and knew of his misrepresentations, and therefore failed to inquire of Fitzpatrick why he had made them. Rather, the prosecutor merely asked Fitzpatrick under oath if he had made the misrepresentations (while not under oath), and prosecuted Fitzpatrick for perjury after he answered negatively. Thus, the prosecutor wholly failed even seriously to attempt to acquire the information he now claims he was seeking.

Were this a direct appeal from a federal district court trial prosecuted by the office of a United States Attorney, we would be inclined to exercise our supervisory powers and vacate the conviction on the basis of what we believe to be questionable conduct by the prosecutor. We do not believe, however, that Fitzpatrick's "perjury trap" claim presents a federal constitutional issue entitling him to a writ of habeas corpus. The grand jury before which Fitzpatrick was called was properly convened to investigate a matter within its jurisdiction. The state did not violate Fitzpatrick's right to due process of law by prosecuting him for intentionally false statements made under oath

to the grand jury, even though those statements were made in response to questionable inquiries by the prosecutor.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgment of the district court is affirmed.

/s/ Leonard P. Moore,
U.S.C.J.

/s/ Thomas J. Meskill,
U.S.C.J.

Lumbard, *Circuit Judge*, concurring and dissenting:

I agree that Fitzpatrick's claims are properly before this court and that they are without merit. However, I cannot agree with the court's dicta asserting that the conduct of the state prosecutor here was improper. As the "perjury trap" claim does not amount to a violation of due process, I see no reason for this court to instruct the state prosecutor on how he should conduct his office. Although we have on occasion expressed our views on the conduct of United States attorneys, we do so in the exercise of our supervisory power over the administration of justice in the federal courts. None of the seven state court judges who passed on this case (the trial judge, the five judges of the Appellate Division which affirmed the conviction, and Judge Bernard S. Meyer of the Court of Appeals who denied leave to appeal) saw any need to comment on the alleged prosecutorial improprieties. I would leave these matters to those who business it is.

/s/ J. Edward Lumbard,
U.S.C.J.

APPENDIX B

Statutes Involved

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the appli-

cant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

§ 210.05 Perjury in the third degree

A person is guilty of perjury in the third degree when he swears falsely.

Perjury in the third degree is a class A misdemeanor.